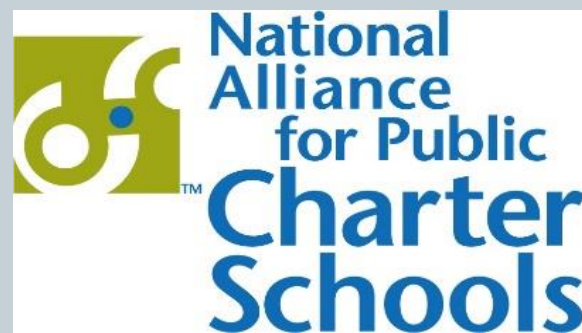


# It's Never Dull in the Land of Public Charter Schools: Emerging Trends & Threats ... and What to Watch



**RENITA THUKRAL**  
**PARTNER, CIVIL RIGHTS SOLUTIONS**  
**SR. NAT'L LEGAL ADVISOR, NAPCS**



# Session Objectives



## What May Matter Most to New Mexico Charter Schools and Supporters?

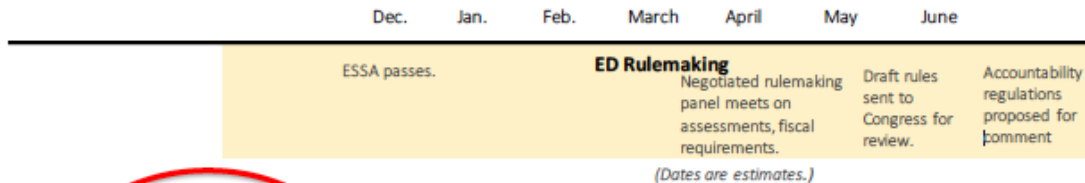
- Federal Statutory and Regulatory Developments
  - Every Student Succeeds Act (ESSA)
  - Internal Revenue Service
  - NLRB and US Department of Labor
- Civil Rights “Hot Topics”
  - Weighted Lotteries
  - Serving Transgender Students
  - Education Technology Accessibility
  - Renting/Purchasing Facilities from Religious Institutions
- National Litigation Update ... Lawsuits Everywhere ...

# Every Student Succeeds Act

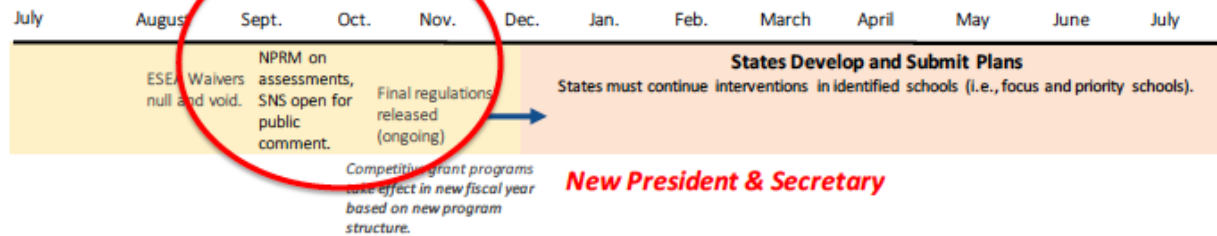


## TIMELINE: 2017-18 FIRST YEAR ESSA RULES IN EFFECT

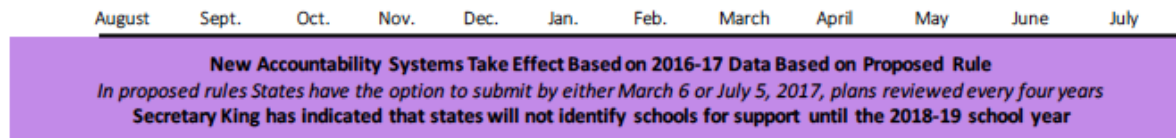
### 2015-16 School Year: Bill Passage and Initial Rulemaking



### 2016-17 School Year: Transition



### 2017-18 School Year: New Systems in Place



# Every Student Succeeds Act



- **Several Key CSP Provisions**
  - More funding
  - Grants last up to 5 years, not 3
  - Entities other than SEA's may apply (governors, charter support organizations, state charter school boards)
  - State entities must provide more assurances than before (when apply for monies)
  - Enrollment/Lottery practices – weighted lotteries and feeder patterns

# ESSA: Four Areas of Potential Re-Regulation



Authorizer  
Accountability

Staffing

Enrollment  
and  
Demographics

CSP  
Application  
Requirements

# ESSA: Enrollment and Demographics



## State Report Cards

- Each state must issue a report card that includes a long list of data items specified in the statute, such as information on the:
  - state's accountability system;
  - student outcomes disaggregated in a variety of ways;
  - a listing of schools identified for improvement and support; and,
  - data on teacher qualifications, on student discipline, on preschool participation, and on enrollment in advanced courses.

Certain data must be provided at the LEA or school level

The report card must be concise, presented in an understandable and uniform format, and made widely accessible to the public

# ESSA: Enrollment and Demographics



USED has proposed new rules that seek data from each authorized public chartering agency in the State:

- comparing the percentage of students in each subgroup in each charter school authorized by the agency with the comparable percentage in the LEA(s) from which the school draws a significant portion of its students (or, at State option, with the percentage for the geographic community within the LEA from which the charter school is located); and
- comparing, in the same manner, the academic achievement for each charter school with the achievement in the local LEA(s) or local community; and
- be disseminated no later than December 31 of each year

# Internal Revenue Service: Public Pension Plan Participation



- **IRS – January 2015 Guidance on Charter School Eligibility to Participate in State Pension Plans**
  - Most significant change: amending dissolution documents
    - ✦ Must state that publicly-funded assets remaining upon dissolution revert to a public school or other government agency
    - ✦ Should be allowed to include this language in governing/incorporation documents, state law or charter contract
  - Most uncertainty: non-charter-holding management organizations that act as the employer for school-level employees
  - Most urgent: permitting schools authorized by non-governmental authorizers to participate in state pension plans



# Internal Revenue Service: Public Pension Plan Participation



- **Pension Participation – Big Picture**
  - Pension participation costs are rising (skyrocketing!) in many places and charter school operators are looking for exit strategies
  - Many state pension systems argue “once in, never out”
  - Charter operators seeking to exit may face fees and penalties that could render exiting cost-prohibitive
  - Many school leaders around the country believe recruiting top talent may require offering access to state pension plans
  - **Legal/Policy Inquiry: can the same charter entity offer both state pension plan benefits and a 403(b)?**

# National Labor Relations Board: Expanding Jurisdiction over Public Charter Schools



- August 24, 2016, the NLRB concluded charter schools in NY and PA were “private employers” for purposes of organizing and therefore were subject to the NLRA
  - Preliminary review of NM statute suggests the same conclusion would be reached here
- Should evaluate whether NLRA treatment is beneficial to your schools; if not, begin considering what legislative changes may be helpful to render schools subject to state labor law instead
  - NLRB rules are tightening; are charter schools really better off under NLRA?
  - What are some unintended consequences of NLRA jurisdiction – for instance, on free speech of employees?

# National Labor Relations Board: Expanding Jurisdiction over Public Charter Schools



- **Big Picture**

- Direct conflict with IRS determination that charters are eligible to participate in state pension plans
- Some legal tension is permissible
- Feeds critics who argue charter schools “want it both ways”

# Department of Labor: Newly Promulgated Overtime Regulations



- Department of Labor – New Overtime Regulations
  - Raised “salary basis test” from \$455/week to \$913/week under the Fair Labor Standards Act
  - Promulgated May 18, 2016
  - Effective December 1, 2016
  - Teacher exemption remains intact
  - Greatest potential impact on administrative and operational staff (e.g., non-instructional staff), many of whom would satisfy the “duties test” associated with Department of Labor’s white collar exemption
  - Employers must keep specific records for non-exempt employees
  - Penalties for non-compliance are severe

# Department of Labor: Newly Promulgated Overtime Regulations



## Key Resources

- Key DOL resources for more information:
  - Overview of Exemptions Fact Sheet:  
[https://www.dol.gov/whd/overtime/fs17a\\_overview.pdf](https://www.dol.gov/whd/overtime/fs17a_overview.pdf)
  - Exemption for Professional Employees Fact Sheet:  
[https://www.dol.gov/whd/overtime/fs17d\\_professional.pdf](https://www.dol.gov/whd/overtime/fs17d_professional.pdf)
  - Overview of the 2016 changes:  
<https://www.dol.gov/whd/overtime/final2016/overtime-factsheet.htm>
- NAPCS Comment Letter:
  - <https://www.regulations.gov/document?D=WHD-2015-0001-5624>

# Office of Civil Rights – Recent Guidance



- Jan. 2014 – non-discriminatory student discipline
- April 2014 – sexual violence, sexual harassment, Title IX
- May 2014 – voluntary use of race/ethnicity to achieve diversity
- May 2014 – enroll all students regardless of immigration status
- May 2014 – applicability of federal civil rights laws to charter schools
- Oct. 2014 – equitable resources made available to all students
- Oct. 2014 – bullying of students receiving services under IDEA/Section 504
- Nov. 2014 – communication with hearing-, vision-, speech-disabled students
- Dec. 2014 – single-sex classrooms and extracurricular activities
- Jan. 2015 – meaningful participation for ELs & communication with LEP parents
- March 2015 – protecting children from measles w/o discriminating by disability
- April 2015 – Title IX coordinator requirement
- May 2016 – serving transgender students under Title IX

***Nearly 30 more to come in the next 2 years***

# Office of Civil Rights



- **VERY active enforcement effort by OCR**
  - 10,000 complaints filed in each of the last two fiscal years
  - 200 new staff attorneys to be hired for 12 regional offices and 1 national office
  - Notable charter school specific complaints:
    - ✦ ACLU filed OCR complaint against State of Delaware alleging state charter statute violates federal civil rights laws (December 2014)
    - ✦ Centro de Comunidad y Justicia filed OCR complaint against State of Idaho, all charter schools and all board members also alleging state charter statute violates federal civil rights laws (May 2015)

# Civil Rights Hot Button Issues



- **Enforcement still focuses primarily on:**
  - Ensuring outreach and recruitment efforts are inclusionary
  - Serving students with disabilities
  - Serving English Learners
  - Ensuring non-discriminatory administration of disciplinary procedures



# Civil Rights Hot Button Issues



- **Increasing attention paid to:**
  - Bullying/harassment: what is bullying, what is harassment, what is sexual harassment and how to respond
  - Social media behavior and other off-campus behavior: how evaluate whether school must take action
  - Transgender students & faculty: protecting their civil rights

# SCOTUS – Special Education Case



- **Andrew F. v. Douglas County School District**
  - Addresses a split in the federal circuit courts re: how much educational benefit is enough for students with disabilities?
  - Some federal courts adhere to the “meaningful educational benefit” standard
  - Other federal courts adhere to a “de minimis” standard
  - Most significant special education case in a generation
  - Briefing should be complete November 21<sup>st</sup>; oral argument likely scheduled in the late winter or early spring

# Weighted Lotteries



- **Revised Non-Regulatory CSP Guidance – January 2014**
  - "Slight" preference for educational disadvantaged students
  - No set asides
  - Requires state law, regulation, policy or AG opinion to explicitly permit the use of weighted lotteries
- **Nationally: Significant Interest by Operators & Advocates**
  - Several states have amended state statutes to expressly permit weighted lotteries for educationally disadvantaged or at-risk students
- **Assigning Lottery Weights & Administering Lottery Can Be Tricky**

# Weighted Lotteries – Post-ESSA



- New statutory language permits CSP grantees to use weighted lotteries for educationally disadvantaged students to provide a slightly better chance of admission, unless prohibited by state law
- Technically, this language does not anticipate/set up an oversight process by SEA's or USED; simply relies on state law
- Unclear how USED will approach its oversight
- In the meantime, interested applicants should adhere to the process/criteria already in place

# Serving Transgender Students



- On May 13, 2016, US Departments of Education and Justice issued a new Dear Colleague Letter, calling it a “significant guidance” that does not add new elements to applicable law but clarifies and explains what Title IX compliance entails
  - Title IX requires all recipients of federal funds to agree not to exclude, separate, deny benefits or otherwise treat differently on the basis of sex any person in its education programs or activities
  - The guidance provides key definitions of “gender identity,” “sex assigned at birth,” “transgender,” and “gender transition”
  - A student’s gender identity is her/his sex for purposes of Title IX; therefore, a school must not treat a transgender student differently from the way it treats other students of the same gender identity
  - No medical documentation is required; a transgender student’s request to be treated consistently with her/his gender identity is sufficient to trigger protections

# Serving Transgender Students



## What About Sex-Specific Spaces and Activities?

- Restrooms
- Locker Rooms
- Single Sex Classes
- Athletic Teams
- Overnight and Housing Accommodations
- Other Sex-Specific Activities and Rules

# Serving Transgender Students



- Must pay careful attention to potential harassment and bullying of transgender students
  - Must ensure school does not present a hostile environment (as a result of harassment and/or bullying, or as a result of school's failure to treat transgender student consistently with her/his gender identity)
- Must address transgender student by name and pronouns reflective of student's gender identity
- Student's education records may be amended to reflect student's gender identity if so desired by student/family; if school denies request to amend student's education records, school must provide student with a hearing (under FERPA)
- Title IX violation may occur if school limits a student's educational opportunities by failing to take reasonable steps to protect students' privacy related to her/his transgender status, including her/his birth name or sex assigned at birth

# Education Technology Accessibility



- **Education Technology Accessibility**
  - Expected Rulemaking by USDoJ
  - NAPCS Webinar, December 2015
- **Applicable Laws**
  - IDEA, ADA, Section 504 and Section 508 of the Rehabilitation Act



# Education Technology Accessibility



- **What Problems Can Arise**

- Images do not have embedded coding that allows screen reader software to describe the images
- PDF documents that cannot be read by screen readers
- Audio that does not have closed captioning
- Chat rooms not accessible to people with disabilities
- Programs that can only be manipulated with a mouse and not a keyboard
- Electronic forms not compatible with assistive technology
- Third-party content is not accessible

# Education Technology Accessibility



Goal: Students with disabilities must receive communication as effective as communication with others through provision of auxiliary aids and services

- Develop nondiscrimination policy
- Consider needs of students and parents/guardians
- Consider technology is available 24 hours/day
- Review school's recruitment/application process and walk through a student's typical day
- Review curriculum
- Ensure procurement contracts require accessibility
- Put together accessibility team with Section 504 Coordinator

# Renting/Purchasing Religious Facilities



- Nationally, witnessing more active scrutiny of charter operators who rent or purchase facilities from religious institutions
- Recommendations
  - Understand relevant federal and state law
  - Draft lease and purchase agreements to account for and properly allocate the risk associated with renting/purchasing facilities from religious institutions
  - NAPCS publication “Separation of Church and School: Guidance for Public Charter Schools Using Religious Facilities” (released August 2015, webinar February 2016)

# National Litigation Update – States at a Glance



## Funding Lawsuits

Arizona

California

Delaware

Louisiana

Maryland (Baltimore)

New York

Texas

Washington DC

## Other Lawsuits

Florida, Illinois, Pennsylvania

- challenge authority of non-district authorizers to approve charters on appeal

Massachusetts

- cap on number of and funding for charter schools

Minnesota

- charters exempt from district's voluntary desegregation plan

Missouri

- charters being sued to return local monies received for desegregation purposes

Texas

- public v. private status (whistleblower statute and authority to sue state)

# More Questions? Reach Out...



**RENITA THUKRAL**

**[RENITA@CIVILRIGHTSSOLUTIONS.COM](mailto:RENITA@CIVILRIGHTSSOLUTIONS.COM)**

**[RENITA@PUBLICCHARTERS.ORG](mailto:RENITA@PUBLICCHARTERS.ORG)**